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STATE OF WASHINGTON

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No. 84695-2

**IN THE SUPREME COURT OF
THE STATE OF WASHINGTON**

J. E. EDMONSON, et ux, et al.

Plaintiffs

v.

IVAN G. POPCHOI, et ux.

Respondents

v.

CSABA KISS,

Appellant.

***RESPONDENTS' RESPONSE TO
PETITION FOR REVIEW***

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I. SUMMARY OF TRIAL COURT PROCEEDINGS

Csaba Kiss sold Mr. and Mrs. Popchoi a Bellevue lot on May 6, 2006 by Special Warranty Deed. Jim and Ilene Edmonson owned and lived in the home on the lot adjacent to the Popchoi lot's southern border. F/F 7, CP 142.¹ After the sale, the Edmonsons sued the Popchois, claiming adverse possession to a strip of the Popchois' land adjacent to their common border. Invoking the seller's statutory warranty of title and duty to defend the Popchois' title, the Popchois tendered defense of the adverse possession claim to Csaba Kiss on August 18, 2006. Tr. Ex. 2; F/F 8, CP 142-43. Mr. Kiss refused to defend the Popchoi's title, forcing the Popchois to retain an attorney to defend against the Edmonsons' adverse possession claim. C/L 6. Following considerable discovery, and based in part on submission of the declaration of the former owner of the Popchoi/Kiss property who had erected a fence along the common boundary, the Edmonsons obtained title to the disputed strip of land by summary judgment. F/F 22, 23, CP 137.

The Popchois asserted claims against their seller, Csaba Kiss, for breach of warranty of title. The Honorable Bruce Hilyer, King County Superior Court Judge, found that Csaba Kiss had breached his warranty of title

¹ Appellant did not assign error to any of the findings of Fact or Conclusions of Law. The appellate court must treat unchallenged findings as verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 238, 23 P.3d 520 (2001).

to land adversely possessed by the Edmonsons, for which the Popchois had paid Kiss \$10,993.63. C/L 9, CP 153. The Trial Court ruled that Csaba Kiss had also breached his duty to defend the Popchois' title and imposed judgment against Csaba Kiss for \$30,281.90, which is the amount of attorneys fees and costs that the Popchois had paid to defend their title. C/L 7, CP 152. On February 2, 2009, the Trial Court entered judgment for these damages, plus \$3,609.86 in interest on the excess land payment, for a total judgment of \$44,885.39. CP 174-75.

II. SUMMARY OF COURT OF APPEALS' DECISION

Csaba Kiss appealed the judgment on the following two grounds:

- A. That the seller should be permitted to "satisfy" the covenant to defend the buyer's title by demanding that the buyer convey the disputed land to the claimant and settle for a partial refund of the purchase price paid for the part of the land subject to the title dispute.
- B. That the Popchois' survey disclosed the location of their lot's rear yard fence as several inches inside of their lot's south property line, which alerted the Buyers that "the neighbor's fence encroached onto the parcel." Appellant's Brief at 5. *See* Tr. Ex.'s 14, 102. Appellant claims that the Buyers had a duty to notify the Seller of the encroachment and that their failure to do so relieved the seller of his warranty of title obligations. CP 142.

The Popchois argued that Mr. Kiss cannot "satisfy" his statutory duty to defend the Popchois' title by conditioning his performance on the buyers' advance consent to convey the disputed property to the adverse claimant in return for a partial refund of the purchase price, as damages. Allowing the

seller's "condition" would eliminate the seller's obligation to defend the buyer's title altogether, reducing the seller's statutory covenants to a single obligation – to refund to the buyer the portion of the purchase price paid for the challenged property. Allowing Mr. Kiss's "conditions" would force the buyer to consent both to the seller's breach of the duty to defend the buyers' title (by acceding to the buyers' demand that the disputed land be conveyed to the claimant) **and** to breach of the seller's warranty of seisin (good title) and warranty of quiet enjoyment (by losing title to the disputed land and forcing the buyer into a lawsuit with seller over damages). The warranties accompanying a Statutory Warranty Deed would be meaningless if the seller had the right to evade them simply by conveying the disputed land to the claimant and refunding the buyer the purchase price paid for conveyed land.

The Court of Appeals agreed, holding that the seller was required to defend the buyers' title and could concede the adverse claimant's right to title only after conducting a reasonable investigation and concluding that the buyer had no good faith defense to the claim. Opinion at 9-10.

The Court of Appeals correctly rejected Mr. Kiss's argument that the buyer had a duty to notify the seller of the "encroachment of the neighbor's fence" on the buyer's property. Kiss VP 37-38. In fact, there was no encroachment because the referenced fence did not belong to the neighbors. It was erected by a previous owner of the Popchoi lot, Kay Davis, to fence her

dog into the back yard. CP 38; CP 207-215. Mr. Kiss testified that he knew that the fence was there, never surveyed the property and did not know whether it was on the property line or not. Kiss V.P. 22, 37-38; F/F 5, CP 142.

The Court of Appeals properly rejected Mr. Kiss's claim that his warranty obligation was excused by the buyers' failure to notify Mr. Kiss of their survey for three, independent reasons: First, the location of the rear-yard fence on the survey could not alert the buyers to any adverse claim by the neighbors because it was not the neighbors' fence. It was installed by the previous owner of the Popchoi lot. Moreover, back yard fence covered less than half of the disputed strip of land. C/L 5, CP 151-52; Tr. Ex.'s 14, 102. In addition to the small strip of land adjacent to the back yard fence, the neighbors claimed adverse possession of over 80 feet of open land along the Popchois' side yard and front yard, where there was no fence at all, just grass merging the two lots. Summary Judgment Order; Tr. Ex. 18; photos, Tr. Ex. 108 (Exhibit 5).

Second, a buyer's knowledge of a possible title defect does not relieve the seller of any warranties of title, as a matter of law. *Foley v. Smith*, 14 Wn. App. 285, 539 P.2d 874 (1975), which held that the purchaser's knowledge of an outstanding potentially superior claim to the land does not defeat the purchasers' right to recover for breach of the warranty of title. The *Foley* court held that the seller's warranty obligation extends to both known and unknown

claims and that the seller's duty to defend the title includes rightful claims, as well as wrongful claims. C/L 3, CP 151. The Court of Appeals agreed. Opinion at 15.

Third, the Court correctly ruled that closing the sale after receiving the information disclosed by the survey did not constitute a knowing and voluntary waiver of the buyers' right to enforce the statutory warranties. C/L 11, CP 154.

III. APPELLANT DID NOT ASSIGN ERROR TO ANY FINDINGS OR CONCLUSIONS, WHICH ARE NOW VERITIES.

Mr. Kiss did not assign error to any of the Findings of Fact or Conclusions of Law. Therefore, the appellate court must treat these unchallenged findings as verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P2d 313 (1994); *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 238, 23 P3d 520 (2001).

IV. THE COURT OF APPEALS' DECISION IS SUPPORTED BY SETTLED LAW.

By selling the property to the Popchois by statutory warranty deed, Csaba Kiss made 5 covenants against title defects, one of which is the duty to defend the grantee's title. C/L 2, CP 151. Relying upon *Mastro v. Kunakichi Corp.* 90 Wn. App. 157, 162-63, 951 P2d 817 (1998), the Court of Appeals affirmed the Trial Court decision that, as a seller who had refused to defend the grantee's title after receiving notice and tender, Csaba Kiss was liable to his grantee for breach of contract damages and for reimbursement

of the reasonable attorneys fees that the buyers' spent defending their title.
C/L 2, CP 151.

The Court of Appeals likewise ruled that Csaba Kiss's waiver argument was without merit, based on the holding of *Foley v. Smith*, 14 Wn. App. 285, 539 P2d 874 (1975), that the purchaser's knowledge of an outstanding potentially superior claim to the land does not defeat the purchasers' right to recover for breach of the warranty of title. C/L 3, CP 151. The Court noted the *Foley* court's holding that the seller's warranty obligation extends to both known and unknown claims and that the seller's duty to defend the title extends to includes rightful claims, as well as wrongful claims. Opinion at 12-13; C/L 3, CP 151, 154. The Court held that, under *Foley*, the buyers' knowledge of a potential claim does not affect their right to assert claims based on breach of warranties given by statutory warranty deed. *Id.*

V. THE COURT OF APPEALS' DECISION AFFIRMS SELLERS' LONG STANDING COVENANTS TO BUYERS.

The Court of Appeals' decision was based on applying settled law established by cases decided in 1975 (*Foley*) and 1998 (*Kunakichi*) to facts set forth in Findings that are not challenged on appeal. Mr. Kiss submits no factual or legal support for his claim that the decision expands the warranty obligations imposed on sellers who convey property by statutory warranty

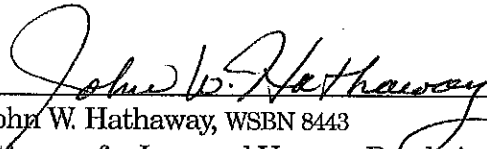
deed. Petition for Review at 8.

VI. CONCLUSION

The seller has not challenged any of the trial court's Findings of Fact or Conclusions of Law. This Court should deny the Petition for Review because the Court of Appeals properly affirmed the trial court's decision applying settled Washington Law concerning the duty owed a buyer of real property by a seller who conveys title by statutory warranty deed.

DATED this 15th day of July, 2010.

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